United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 76-4046

United States Court of Appeals

FOR THE SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Union did not violate Sections 8(b)(4)(B) and 8(e) of the act either by invoking, in an arbitration proceeding, a work preservation clause that was valid on its face or by expressing its intention to take such action.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of the Carrier Air Conditioning Company (hereinafter "Carrier"), the charging party below, filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), to review an order of the National Labor Relations Board dismissing a complaint against Sheet Metal Workers International Association, Local 28, AFL-CIO (hereinafter "Local 28" or "the Union"). The Board's Decision and Order, which issued on February 5, 1976, is reported at 222 NLRB No. 110 (R. 29-42).[1] This Court has jurisdiction over the proceedings as the conduct constituting the alleged unfair labor practices occurred in New York City. The respondent in the Board proceeding, Local 28, has been granted permission to intervene herein.

I. THE BOARD'S FINDINGS OF FACT

A. Background: The applicable contract provisions and the nature of the dispute

The collective-bargaining agreement between Local 28 and the Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., (Herein "SMACMA") to which Three Boro Sheet Metal and Ventilating Co., Inc. (hereinafter "Three Boro") and General Sheet Metal, Inc. (hereinafter "General") are bound by separate agreement, contains a no-subcontracting clause which provides in pertinent part:

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[1] Record references ("R.") are to the pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. SA references are to the supplemental appendix printed at the end of the Board's brief.

II. MEMORANDUM CONTAINING NO SUBCONTRACTING CLAUSE

For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow; except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:

1. Radiator enclosures except when manufactured and sold as a unit including heating element.

2. Functional louvers.

3. Attenuation boxes except for mechanical devices contained therewith.

3a. Sound traps.

4. Dampers: All types of Dampers, including Automatic Dampers and multi-zone Dampers, Manual Control Dampers and Fire Control Dampers, except Patented Pressure Reducing Devices. OBD's and Santrols are per sketches B and C annexed hereto.

5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding ½ Round Gutters).

6. Air handling units in excess of 30,000 C.F.M.'s.

7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.

> All the work described in this "no-subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this agreement.

(R. 86).

No penalty is specified in the no-subcontracting clause. However, Rule XIX of the agreement provides that the penalty for violation of the agreement shall be censure for the first offense. For a second offense, the only penalty is imposition of "a fine commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeymen sheet metal workers by reason of such violation" (R. 88).

The dispute between Carrier and Local 28 concerns a component of a central air-conditioning system known as a plenum which is specifically included under "5" of the no-sucontracting clause. A plenum is a four-sided box made of sheet metal which serves a variety of purposes including the regulation of air pressure and noise abatement. Local 28 has historically and traditionally fabricated, assembled and installed all plenums in New York City on an exclusive basis (R. 33; 246-247, 255, 334-335, 374).

Approximately ten years ago, however, Carrier developed a new air-conditioning unit called a "variable volume moduline unit" which incorporated a pre-fabricated plenum, already attached to the new moduline unit (model 37P). Since that time Local 28 has declined to waive its guaranteed right under its contract with SMACMA to the work of fabricating and assembling plenums, despite the attempts of non-party Carrier to get it to do so. The moduline units at issue are manufactured by Carrier in Tyler, Texas, at a plant organized by a sister union of Local 28 (R. 12; 178, 427).

B. Local 28 decides not to waive the contract

When Carrier initially set out to market the moduline units in New York City in 1966, it sought out Local 28 and requested that the Union surrender the work of fabricating and assembling plenums, retaining only the installation work (R. 33-34; 181-192, 248-251). When Local 28 refused, Carrier offered to redesign the units to eliminate the prefabricated plenums, allowing the plenums to be manufactured in New York by members of Local 28 (R. 34, 4; 194-195, 197-199). In exchange the Union agreed to allow installation of prefabricated Carrier units on two jobs, Presbyterian Hospital and Carrier's home office, to proceed without bringing charges for violation of the bargaining agreement (R. 34, 4; 194-195).

Pursuant to this agreement, Carrier furnished moduline units without plenums attached (a redesigned 37P unit) for several New York City jobs over the following years. Triangle Sheet Metal Co., Inc., whose employees are members of Local 28, fabricated and assembled the plenums on the Police Building job in Manhattan according to specifications furnished by Carrier. Triangle had made plenums "similar or compatible to this . . . many times" prior to the Police Building job; the job involved only "very simple sheet metal work" (R. 483). Prior to installing the assembled units, Triangle discovered air leakage which it believed was due to improper specifications furnished by Carrier. Carrier advised Triangle on the additional work necessary to correct the problem, and Carrier paid Triangle approximately $10,000 for performing this additional work. After the units were installed they were found to work satisfactorily. (R. 34, 7, 14-15; 147-154, 199, 255-261, 479-496).

Additional plenums for model 37P moduline units were fabricated

and installed by J. J. Flannery, Inc., a sheet metal contractor, again using employees who were members of Local 28. Flannery performed this work on at least two separate jobs at Presbyterian Hospital. After the work on each job had been completed, the installed system was approved and no complaints have been received by Flannery about those jobs (R. 15-16; 503, 513-521). Essex Sheet Metal Works fabricated and assembled the plenums for Carrier's 37P moduline units on the Staten Island Community College job, again employing Local 28 members. There is no evidence that the over 200 plenums fabricated for the Staten Island job were defective or unsatisfactory in operation in any way (R. 17-18; 548-550). Nevertheless, Carrier subsequently claimed that the 37P unit with plenums made separately was "not economically feasible, it would not sell" (R. 34; 202).

In 1972, after Carrier had introduced a new moduline unit (the 37A) with prefabricated plenums, Carrier requested the Union to review its position with regard to the moduline units. The matter was referred to the Sheet Metal Industry Research and Review Committee, made up of three union members known for their expertise and experience in the industry. After studying the problem, the Committee recommended that Local 28 waive its contractual protection and accept the moduline unit with the pre-fabricated plenum tested and calibrated by Carrier. (R. 35, 5, 9; 93-97.)

In June, 1973, Local 28's executive board recommended, contrary to the Committee's recommendation to it, that the Union's membership refuse to grant any concessions to Carrier with respect to its moduline units and continue to oppose jobsite installation of those units in New York City if they arrived prefabricated. The resolution specified that "no allowance be

made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York City area." This recommendation was presented to and adopted by the membership of Local 28 on June 21, 1973. (R. 35, 10; 134-136, 366-367, 375-381.)

C. The Van Etten job

In early 1973, architectural plans were prepared for the construction of the Van Etten Drug Treatment Center in the Bronx. The mechanical specifications for heating, ventilating and air-conditioning called for the use of "variable volume linear air diffusers Carrier Moduline or approved equal" (R. 35; 104-105). The heating, ventilation and air conditioning contractor for the project, Acme Climate Control Corp., issued a purchase order for the Carrier moduline 37A units pursuant to the specifications. Subsequently Acme subcontracted certain sheet metal work, including the installation of the Carrier moduline units, to Three Boro. On October 8, 1973, the verbal agreement between Acme and Three Boro was confirmed in a letter in which Three Boro stated:

> We agree to install only (furnished by others) air outlets, fans, air conditioning equipment (50% labor) automatic dampers, sound traps. We take exception to the following: removals of ductwork, cutting, patching, painting, housekeeping, pipe sleeves, testing and balancing fin-tube enclosures, plenums for Carrier units (supply outlets) . . . . (R. 116, 400-402).

Despite Three Boro's objections to the Carrier units, Acme persisted with its decision to purchase those units.

On October 18, 1973, the erasure of the Carrier moduline units from

the blueprint drawings of the Van Etten job was discovered. Ted Johansmeyer, the sketcher employed by Three Boro assigned to prepare the drawings and a member of Local 28, told the president of Acme Climate Control Corporation that he was responsible for the erasures (R. 36, 10; 392-393).

When Carrier's district manager, A. C. Contardi, heard of this incident he called the president of Local 28, Pasquinucci, to discuss the matter. Contardi's account of the conversation was (R. 219-220):

> Contardi: Dan, I hear there's trouble on the Van Etten job. Dan, I understand you have refused to let them sketch the job.
>
> Pasquinucci: That's so.
>
> Contardi: Dan, are you, as a union representative, telling me, as representative of Carrier, that you will not permit this unit to come in, into New York?
>
> Pasquinucci: That's so.
>
> Contardi: Well, you know what this is going to mean.
>
> Pasquinucci: I do.

Carrier filed the charge in Board Case No. 2-CC-1296 on October 25, 1973, based on the foregoing events at the Van Etten job. On November 13, 1973, Carrier representatives met with Union President Pasquinucci in an attempt to settle the dispute. Pasquinucci again refused to waive the contract protection or agree not to enforce the bargaining agreement, stating that "he could not permit the unit to come in [to New York]." (R. 37; 221-222). On December 27, 1973, Carrier filed the charge in Board Case 2-EE-66.

When the moduline units ordered by Acme arrived at the jobsite with the plenums completely assembled Three Boro refused delivery. Three Boro wrote Acme on February 21, 1974, explaining that the units with plenums pre-fabricated and assembled were not in conformity with the December 5 contract (R. 10; 140-141). Local 28 and Carrier subsequently reached an agreement permitting installation of Carrier moduline units at the Van Etten job to proceed normally. Local 28 agreed to waive its reliance on the application of the work preservation clause to the work performed by Three Boro, and Carrier agreed to ask the Board not to proceed with its unfair labor practice charge challenging the legality of the Union's interpretation. This agreement was reached in anticipation of a broader settlement of the dispute which would have furnished a basis for a permanent waiver of the work preservation clause with respect to Carrier moduline units, but this overall settlement was contingent upon the outcome of the Union election scheduled for July 1, 1974 (R. 37, 6; 118, 119, 224-226). As a result of this agreement between the Union and Carrier, Acme, the general contractor, wrote Three Boro on February 25 confirming that "based on this agreement you have agreed to proceed with these [Carrier] units" (R. 10; 142).

D. The Babies Hospital job

In January 1974, Columbia Presbyterian Hospital entered into an agreement with H. Cohan Contracting Corp. to perform the mechanical work on its Babies Hospital Addition for a contract price of over a half million dollars (R. 121). The specifications prepared by the architects and consulting

engineers called for the installation of Carrier's 37AF air terminal units, including plenums as fabricated by Carrier (R. 37; 120, 122). Cohan ordered the units from Carrier, then subcontracted certain sheet metal work, including installation of the Carrier moduline units, to General Sheet Metal, Inc. (R. 37; SA 1). General's Contract was for $181,200 (SA. 1).[2] General is a member of SMACNA and is bound by the bargaining agreement between that association and Local 28.

In the meantime Pasquinucci lost the July 1 union election to Robert Stack. On July 19, 1974, Contardi met with the newly elected president, Stack, to discuss the earlier tentative agreement made with Pasquinucci. After reviewing the situation, Stack told Contardi that the Union had decided to "insist that [Carrier] go along with the agreement as written" (R. 37, 6, 18; 230-232, 293-294).

Consistent with this position, the Union filed a breach of contract charge against General which requested a hearing by the Joint Adjustment Board.[3] The grievance filed November 7, 1974, charged that:

> General is in violation of our Collective Bargaining Agreement, Addendum "B", Part II, last unnumbered paragraph, by permitting and for accepting work covered by our Agreement–fabrication of plenums–involving the Carrier Moduline Unit, for installation at the Presbyterian Medical Center, Babies Hospital, (168th Street and Broadway New York City) to be performed by persons who are not within

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[2] Although this figure was partially erased from the document in evidence, the Board believes it to be correct.

[3] The Joint Adjustment Board consists of an equal number of representatives from the Union and the Contractors Association. The Board is established by the collective bargaining agreement for the purpose of resolving grievances arising out of the interpretation or enforcement of the contract. A majority is necessary for the Board to reach a decision. (R. 82).

> the bargaining unit covered by our Agreement, rather than by its journeyman and apprentice sheet metal workers.
>
> This violation has caused and will continue to cause the covered employees monetary losses for which reasonable compensation is sought based upon the loss of manhours of work.
>
> We request that this matter be heard and determined by the Joint Adjustment Board as soon as possible (R. 145)

The Union subsequently passed a resolution which alleged that General was in violation of the collective bargaining agreement and proposed, pursuant to Article XIX of that agreement, that General pay $2153.60 to the Local 28 Sick Dues Relief Fund (R. 38, 19; 146). This sum represents the actual wage loss caused by the alleged violation, computed by estimating the man-hours necessary to fabricate the plenums and multiplying the resulting figure (160 hours) by the journeyman rate of $13.46 per hour (R. 19; 146). On March 7, two days after General began to install the moduline units on the Babies Hospital job, the Joint Adjustment Board met to consider the above grievance (R. 12, 19; 432-434). The Board never reached a decision, however, as General stopped installation of the Carrier units that day until Carrier agreed to reimburse General for the full amount of the damages claimed by the Union (R. 38, 12, 19; 432-434, 569-571). Installation resumed on March 20 without further interruption after General paid the damages and received full reimbursement from Carrier (R. 19; 144, 155, 156, 571).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board concluded that the Union did not engage in threats, restraint or coercion proscribed by Section 8(b)(4)(ii)(B) of the Act either by enforcing a work preservation clause that was valid on its face through invoking its contractual arbitration procedure in an effort to obtain compensation for a breach of its provision, or by making statements to Carrier representatives reaffirming its reliance on the lawful work preservation clause. The Board also concluded that the Union's unilateral attempt to apply this valid work preservation clause to the disputed Carrier plenums through such "peaceful means" (R. 40) did not violate Section 8(e) of the Act. Having found that the Union had not resorted to coercive tactics proscribed by the Act, the Board found it "unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed." (R. 41). The Board based its disposition on its earlier decisions in *Southern California Pipe Trades District Council No. 16 of the United Association, et. al. (Associated General Contractors of California, Inc.)*, 207 NLRB 698 (1973), reversed *Associated General Contractors of California, Inc. v. N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975), and *Southern California Pipe Trades District Council No. 16; Plumbers & Steamfitters Local 582 (Kimstock Division, Tridair Industries, Inc.)*, 207 NLRB 711 (1973). Finally, the Board found

that the Union's presentation to its membership of a resolution recommending that its collective bargaining rights not be waived for Carrier plenums did not violate Section 8(b)(4)(i)(B) of the Act and that the isolated action of one Union member in erasing Carrier units from the sketches for the Van Etten job was not induced by the Union in violation of Section 8(b)(4)(i)(B) of the Act.[4]

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION DID NOT VIOLATE SECTIONS 8(b)(4)(B) AND 8(e) OF THE ACT EITHER BY INVOKING, IN AN ARBITRATION PROCEEDING, A WORK PRESERVATION CLAUSE THAT WAS VALID ON ITS FACE, OR BY EXPRESSING ITS INTENTION TO TAKE SUCH ACTION.

A. Applicable Principles

Sections 8(e) and 8(b)(4)(B)[5] together implement the dual congressional objectives of preserving the right of labor organizations to bring pressure to

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[4] In dismissing the above allegations, the Board reversed the decision of the Administrative Law Judge. The Board further overturned other findings by the Administrative Law Judge of alleged violations based on events occurring more than six months before the filing of the charges and therefore barred by Section 10(b) of the Act.

[5] Section 8(e) of the Act forbids a union and an employer "to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person."

Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a union or its agents:

bear on offending employers in primary labor disputes and of shielding employers and others from pressures in controversies not their own. *N.L.R.B. v. Denver Bldg. and Construction Trades Council,* 341 U.S. 675, 692 (1951); *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 620-627 (1967); *N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe),* 400 U.S. 297, 302-303 (1971). The "touchstone" of legality under these two sections of the Act, enacted as part of the Landrum-Griffith Amendments of 1959 to close loopholes in the secondary boycott provisions of the Taft-Hartley Act of 1947, is whether, " under all the surrrounding circumstances, . . . [an] agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" or is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Association v. N.L.R.B., supra,* 386 U.S. at 644-645. The task of classifying disputed conduct as legal or illegal in the varying factual circumstances of particular cases is "normally difficult" (*N.L.R.B. v. Local 825,*

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[5] (continued)

(i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .

Provided, that nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Operating Engineers, 400 U.S. 297, 303 (1971) and often involves "the drawing of lines more nice than obvious." *Local 761, International Union of Electrical Workers v. N.L.R.B.*, 366 U.S. 667, 672 (1961).

While it is clear that "Congress meant that both Sections 8(e) and 8(b)(4)(B) reach only secondary pressures" (*National Woodwork, supra*, 386 U.S. at 638), differences between the provisions of Section 8(b)(4)(B) and Section 8(e) dictate a different focus to the inquiry. The question in an 8(e) case is whether the two parties entered into an agreement whereby the employer agreed to cease doing business with another person. To establish a Section 8(b)(4)(i) or (ii)(B) violation, it must be shown that (1) the union either induced or encouraged employees to engage in a work stoppage or threatened, coerced, or restrained any person engaged in commerce and (2) that this was done with an object of forcing any person to cease doing business with any other person (i.e. for a secondary object.)[6] Thus, in *National Woodwork v. N.L.R.B., supra*, 386 U.S. at 645-646, the Supreme Court made discrete findings as to (1) whether the contract clause came within the prohibition of Section 8(e) and (2) whether the union's jobsite conduct of engaging in a work stoppage by refusing to hang prefabricated doors violated Section 8(b)(4)(B). It first found that the "making of the 'will not handle' agreement was not a violation of 8(e)" because "the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters." *Id.* at 646. The Court then found that the Union's subsequent "maintenance of the provision" by a work stoppage was not a

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[6] The Supreme Court noted in *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 54 (1964), "[h]armony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement . . . and subsection (ii) to condemn an attempt to induce only if the inducement would threaten, coerce, or restrain."

violation of Section 8(b)(4)(B). *Id.*

In upholding the validity of agreements directed at work preservation, the Supreme Court in *National Woodwork* recognized the desirability of voluntary union-employer agreements to meet the problems of technology and automation. 386 U.S. at 640-643. The Supreme Court noted with approval that the collective bargaining framework generally resolves such problems through the arbitral process. It referred to statements from its earlier decisions indicating that contract provisions dealing with job abolition through contracting out involve the " 'type of claim [that] is grist in the mills of the arbitrators.' " *Id.* at 643 (quoting from the citation in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211-212 (1964) to *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584 (1960)). Hence, the "basic policy of the national labor legislation to promote the arbitral process" (*Local 174 Teamsters Union v. Lucas Flour,* 369 U.S. 95, 105 (1962)) is applicable to labor-management agreements designed to meet the effects of advanced technology. See, *National Woodwork v. N.L.R.B., supra,* 386 U.S. at 642-643; *United Optical Workers Union Local 408 v. Sterling Optical Co., Inc.*, 500 F. 2d 220, 223 (C.A. 2, 1974).

As we show below, the Board properly applied the above principles in concluding that the Union did not violate Section 8(b)(4)(B) and 8(e) as applied, by resorting to its contractual remedy when new technology threatened a reduction of work for its members.

[7] The fact that the Board reached a different result in this case from that of the Administrative Law Judge does not change the scope of judicial review. The Board's reversal of the Administrative Law Judge was not based on any disagreement concerning credibility resolutions, but rather concerned the inferences drawn from undisputed testimony. Thus, this is a case where "the presumptively broader gauge and experience of members of the Board have a meaningful role" (*Oil, Chemical & Atomic Workers, Int'l Union, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 946

(continued)

B. The Union's filing of a grievance seeking enforcement of the work preservation provision in its collective bargaining agreement was not coercive conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Here Local 28 did no more than invoke its contractual procedures to remedy what it deemed a breach of the valid work preservation clause[8] in its collective agreement. The Board found that this conduct did not amount to threats, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act. The Board's view is that a party does not engage in statutorily proscribed threats, coercion, or restraint by invoking a reasonable and peaceful contractual procedure in order to obtain damages for the contractual breach committed by the other party to the contract. Because the Board found that the Union did not use coercive means to enforce its work preservation clause, it was unnecessary for the Board to reach the question of whether the Union's object was primary or secondary. The Board's conclusion reflects a proper accommodation of the fundamental policies of the Act. The Act's Declaration of Policy and its Section 1 declare as its basic purposes "to provide orderly and peaceful procedures for preventing . . . interference . . . with legitimate rights" and to promote "the flow of commerce by removing certain recognized sources of industrial strife and unrest" such as strikes, picketing, and threats. Experience

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(C.A.D.C., 1966) and the Administrative Law Judge's contrary conclusions are entitled to no special weight. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 492-497 (1951). If "on the record as a whole" the reviewing court is unable to say that the Board's dismissal of the Section 8(b)(4)(B) and 8(e) allegations "has no rational basis . . . it must be affirmed." *International Woodworkers of America v. N.L.R.B.*, 263 F.2d 483, 485 (C.A.D.C., 1959).

[8] The validity of the clause is discussed at pp. 32-33, *infra.*

has taught that a peaceful, fair resolution of disputes may be effectuated through arbitration procedures voluntarily agreed to by the parties. As the Supreme Court has frequently recognized, "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 580. See, *Nabisco, Inc. v. N.L.R.B.*, 479 F.2d 770 (C.A. 2, 1973).

These policies are readily reconcilable with the proscriptions underlying Section 8(b)(4) of the Act. It is well settled, of course, that the prohibition of the secondary boycott provisions of the Act extends beyond force, violence, or picketing, as a means of bringing pressure against the neutral secondary employer, and includes economic sanctions as well. Thus, Representative Griffin, in analyzing the new Section 8(b)(4)(ii)(B), referred to the means prohibited as including threatening the secondary employer "with a strike or other economic retaliation." II Legislative History of the LMRDA of 1959, p. 1523. What is involved in this case, however, is not economic retaliation but an agreed upon arbitral procedure for compensation for a breach of contract. As the Board stated in *Associated General Contractors, supra,* 207 NLRB at 699:

> " . . . there is in our view a significant distinction between the use of strikes and picketing or threats of resort to economic weapons in the settlement of labor-management disputes and . . . a contractual agreement . . . for compensation of a breach of contract determined by contractually fair procedures . . . ."

See, *United Association of Pipe Fitters Local Union No. 455 (D.W. Hickey Co.),* 154 NLRB 285, 291-292 (1965), on remand 167 NLRB 602, 604 (1967), remanded on other grounds *sub nom. American Boiler Mfrs. Assn.*

v. N.L.R.B., 404 F.2d 547, 556 (C.A. 8, 1968), certiorari denied, 398 U.S. 960.

The Congressional policy favoring a peaceful collective bargaining approach to the problem of job displacement arising out of technological change is effectuated by entitling a party pursuant to the procedures specified in its contract to file grievances seeking arbitration of its work preservation claim without running afoul of Section 8(b)(4)'s restriction against impermissible coercion. Both the Board and the Courts have indicated that coercion within the meaning of Section 8(b)(4) consists of "non-judicial acts . . . applied by way of concerted self-help . . . " *Sheetmetal Workers v. Hardy Corp.*, 332 F.2d 682, 686 (C.A. 5, 1964). Accord: *Ets-Hokin Corp.*, 154 NLRB 839, 842 (1965), enforced *sub nom. N.L.R.B. v. IBEW, Local 769*, 405 F.2d 159 (C.A. 9, 1968) cert. denied, 395 U.S. 921; *Orange Belt District Council of Painters No. 48 v. N.L.R.B.*, 328 F.2d 534, 537-538 (C.A.D.C., 1964). Resort to arbitration is like resort to the courts, which the Board has considered permissible regardless of the motivation of the person seeking judicial relief. *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960).[9]

In arbitration, as in court, the merits of the dispute are resolved by an impartial tribunal, economic self-help measures are minimized, business

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[9] Of course the Union may resort to such nonjudicial acts of self-help in any primary dispute with an employer. See, *Orange Belt District Council of Painters v. N.L.R.B., supra*, 328 F.2d at 538. The Board did not determine whether this dispute was primary or secondary, however, since it had no need to reach that issue once it found no coercion present.

disruption is avoided, and money damages are available as compensation for the actual damages suffered as a result of a breach of contract. Since these essential characteristics are shared by arbitration and courts, resort to one is no more coercive than resort to the other. *Sheetmetal Workers, Local 49,* 206 NLRB 473 (1973). Cf. *Price v. Sheetmetal Workers,* 83 LRRM 2967 (D. N. Mex., 1973). Accordingly, the Board does not view recourse to arbitration an economic weapon proscribed by Section 8(b)(4). *District No. 71, International Association of Machinists and Harris Truck and Trailer Sales, Inc.,* 224 NLRB No. 10 (1976), 92 LRRM 1284. See also *Teamsters Local 716 (Norman Contractors),* 169 NLRB 156 (1968).[10]

The payment of compensation for lost wages as established by the arbitral forum amounts to a limited added cost for utilizing new technology. Although the manufacturer of such a product may object to the burden such additional costs impose on its marketing efforts, the legitimacy of such costs is implicitly recognized by the Congressional policy of a bargaining approach to work preservation. See *National Woodwork, supra,* 386 U.S. at 632-643. So long as the costs contemplated by the collective bargaining agreement are actual and not punitive costs, capable of being fixed in advance, the contractor and manufacturer are able to proceed with business on an uninterrupted basis. The union will be under pressure

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[10] Contrary to Carrier's contention (Br. 45-46) it was proper for the Board to presume that the Joint Adjustment Board proceedings would be "contractually fair procedures" (R. 40). This presumption is in full accord with the Act's strong policy to encourage practices conducive to the private Adjustments of disputes. Section 1 and 203(d) of the Act. See *Nabisco, Inc. v. N.L.R.B.,* 479 F.2d 770 (C.A. 2, 1973). Moreover, as shown *supra,* Carrier's own intervention into the dispute resulted in the Joint Adjustment Board proceedings being terminated before a determination on the merits had been made. Carrier's efforts to show that the proceeding would not have been fair is nothing more than sheer speculation on its part.

to moderate such "wage preservation" demands in future bargaining in order to allow union contractors to remain competitive with non-union contractors. If the contractor does not want the work preservation clause to apply to prefabricated products, he is free to bargain for that result. See *Enterprise Association, Local 638 v. N.L.R.B.*, 521 F.2d 885, 901 (C.A.D.C., 1975) (petition for certiorari granted No. 75-777). Self-help measures such as strikes or picketing, on the other hand, create industrial strife and disrupt the free flow of commerce. They prevent the use of new technology, create the risk of shutting down the entire job, and represent unpredictable additional costs for the entire project.

In the instant case, the record firmly establishes that the contractually prescribed penalties are not coercive. As shown in the Counterstatement, a warning is issued after a first offense and for a second offense the Joint Adjustment Board assesses damages commensurate with the amount of wages lost to unit members as a result of the violation. Under this contractually agreed upon scheme, the contractor retains the capacity to use the prefabricated product so long as he is willing to incur wage compensation payments for his breach; in bidding for future contracts involving the use of prefabricated products, he can take this fixed cost into account. Therefore, General, the signatory subcontractor herein, had a real alternative to terminating its subcontract or pressuring the general contractor to seek the alteration of the job specifications. His damage obligation was not an onerous burden foreclosing him from fulfilling his commitment to install the prefabricated product. The compensation requested by Local 28 amounted to only $2153.60. When compared to the $181,200 price of General's subcontract for the entire job (SA 1), the compensation

sought represents approximately one percent of the total value of the job. Moreover, since the alternative air conditioning system to the Carrier moduline units would have apparently resulted in additional costs of $27,000 (SA 1) the amount claimed by Local 28 as wage compensation would not in all likelihood cause either General, the subcontractor, or Cohan, the general contractor, to boycott the Carrier moduline units.

Thus, contrary to Carrier's contention (Br. 47-48), the alternative available to General of compensating the unit employees for their lost work is consistent with the "freedom of choice" policy enunciated by the Supreme Court in *Local 1976, Carpenters v. N.L.R.B. (Sand Door & Plywood Co.)*, 357 U.S. 93, 105 (1958). In holding that an employer's consent to a hot cargo clause in the collective bargaining agreement did not protect the union's work stoppage from being unlawful under Section 8(b)(4)(B), the Court stated that "freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy . . . must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into betwen the parties." 357 U.S. at 105. The "wage preservation" nature of the Local 28 contract gives the sheet metal subcontractor just such a choice—whether to comply with the no subcontracting clause or to proceed with the job using prefabricated work with the additional fixed costs for wage compensation incurred due to the contract violation—at the time the "concrete situation" is presented. [11]

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[11] As shown above, the Board did not reach the issue of whether the Union's objective was primary or secondary because it found that the Union's method of (continued)

As we have shown, this contractual mechanism for contract enforcement contemplated that the performance of the job would proceed without impediment. There was no provision for the stoppage of work pending resolution of the charges. Therefore, contrary to Carrier's contention (Br. 45), Local 28's demand for money damages should not have prompted General to suspend installation work on the jobsite. The Union's charge against General requested payment of $2,153.50 as compensation for the work lost due to utilization of prefabricated plenums. The sum was determined by estimating the man-hours necessary to fabricate the number of plenums on that job and multiplying the resulting figure (160 hours) by the journeyman rate of $13.46 per hour. The Union's claim had no relation to the installation work—it concerned solely the already-performed fabrication work. Thus, when General decided on its own to suspend the installation work on March 7, no mitigation of damages was involved. The most logical explanation for General's decision to suspend the installation work is therefore that it wished to put pressure on Carrier in order to gain reimbursement for the consequences of its own breach of contract. In this it was successful, and the installation work resumed approximately ten days after it had been suspended. Hence, General's reaction does not

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11 (continued)
enforcement was not coercive. The Board's analysis makes it unnecessary for the Board to evaluate the Union's conduct pursuant to the Board's "right to control test" (cited by Carrier Br. 39-40), which is a tool used by the Board to determine whether a union's conduct within Section 8(b)(4)(B) has a primary or secondary object. Under "its right to control" test the Board considers union coercive conduct to be secondary if directed against a party that lacks the power to grant the union's demand except by ceasing to do business with another concern or causing the other concern to change its business practices. *Local Union No. 438, United Ass'n. (George Koch Sons, Inc.),* 201 NLRB 59 (1973), enforced *sub nom. George Koch Sons, Inc. v. N.L.R.B.*, 490 F.2d 323 (C.A. 4, 1973).

establish the alleged coercive effect of Local 28's resort to contractual procedures.[12]

Carrier (Br. 43-44) cites the Ninth Circuit's reversal of the Board in *Associated General Contractors, Inc. v. N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975) as authority for its position that resort to contractually established compensation procedures constitutes coercion under Section 8(b)(4)(ii)(B) of the Act. In the instant case, the Board indicated that, notwithstanding the Ninth Circuit's decision, it would continue to adhere to its decision in *Associated General Contractors, supra*, 207 NLRB 698, and applied the principles set forth therein. We submit that the Board's position, set out above, is entitled to acceptance. Thus, it was in the context of a secondary boycott issue arising under Section 8(b)(4) of the Act that the Supreme Court indicated in *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951) that "the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." More recently, the Supreme Court has reaffirmed the principle that it is the Board's "responsibility to adapt the Act to changing patterns of industrial life" *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Since the Board was engaged here in just such an application of the statute, its views, rather than those of the Ninth Circuit, should control in the absence of clear error.

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[12] Contrary to Carrier's implication (Br. 45) neither general contractor Cohan nor subcontractor General informed Carrier that it had to cease installing the moduline units because it could not tolerate the pressures from Local 28's effort to enforce its contractual remedies. Cohan's representative said it "could not tolerate the pressure" (R. 570) because other trade unions "were threatening back charges" (R. 571) on account of delays caused by General's having stopped work. General's representative said merely that he "could not continue as he was not going to pay the fine" (R. 570). Carrier's account of this incident is therefore misleading.

Moreover, there is less basis for viewing the contractual wage compensation method as constituting coercive economic pressure in the instant case than in *Associated General Contractors.* In *Associated General Contractors* there was a contractually mandated work stoppage of 72 hours for the purpose of allowing the joint arbitration board to investigate. This was not the situation here, and Local 28 never attempted a work stoppage or any other form of extra-contractual action. In addition, the task of the instant Joint Adjustment Board was limited to assessing damages for the breach, whereas in *Associated General Contractors* damages was only one of the many remedies available to the arbitration board. Furthermore, the Ninth Circuit's conclusion (514 F.2d at 439) that the payment of damages places an onerous burden on the subcontractor, pressuring him to seek an alteration of business relationships, is simply inapplicable to the circumstances presented by the instant case.

In addition, the decisions cited by the Ninth Circuit as presenting analogous situations to the case before it actually involve far more egregious fact patterns than that presented in either *Associated General Contractors* or the instant case. Thus, in *Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F2d 848, 852 (C.A. 9, 1975), enforcing in pertinent part, 204 NLRB 742, 756-757 (1973), the economic retaliation found unlawful by both the Board and the court consisted of the union's resort to a contractual procedure which provided for the exaction of fines that were arbitrary in that they did not relate to the damages caused by the breach, and which further provided that the contractors found to have violated the warranty clause would have to forego the "substantial contract right" (204 NLRB at 757) to use non-union repairmen to perform warrantly work for six months. Lastly,

some of the contractors fined by the union had signed short-form agreements that expressly excluded them from coverage under the grievance arbitration provisions of the master agreement. In *N.L.R.B. v. I.B.E.W., Local 769 (Ets-Hokin Corp.)*, 405 F.2d 159 (C.A. 9, 1968), cert. denied, 395 U.S. 921, the Court upheld the Board's finding that economic coercion proscribed by Section 8(b)(4)(ii)(B) resulted from union threats to invoke the contractual right to cancel all contracts with all locals in the United States. The punitive, heavy-handed penalties involved in those cases are far different from the limited and carefully defined arbitration procedures to resolve disputes involved in *Associated General Contractors* and the instant case. [13]

Finally, Carrier is mistaken in suggesting that this Court has found contractually based compensation for breach of a work preservation clause to be coercive. Carrier cited (Br. 44-45) for this proposition *Danielson v. Masters, Mates and Pilots (Seatrain Lines, Inc.)*, 521 F.2d 747 (C.A. 2, 1975). That case concerned a union's application of a clause which required the owner of a ship to sell only to a buyer willing to sign up with the union. The court rejected the union's argument that it had no cease doing business object because it merely sought damages as a remedy. It concluded instead that the damage provision was designed to coerce Seatrain to sell vessels only to a transferee willing to sign up with the Union. In support of this result, the court noted that the damages sought were continuing to mount daily, apparently without limit so long as the union did

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[13] The Ninth Circuit's reliance on *Local 48, Sheet Metal Workers International Association v. Hardy Corp.*, 332 F.2d 682 (C.A. 5, 1964), was similarly misplaced. Indeed, that decision held that *judicial* enforcement of a hot cargo clause legal under the construction industry job proviso to Section 8(e) did not amount to coercion under Section 8(b)(4)(ii)(B). The Court did not discuss whether resort to arbitration might amount to coercion, but the analysis it employed supports a negative conclusion.

not man the ship. [14] The court concluded that the contract did not provide the owner "with a reasonable alternative (e.g., payment of a fixed sum) that would permit it to sell" a vessel without compliance with the contract. 521 F.2d at 753.

The case at bar presents the very situation which this Court suggested as a reasonable and presumably non-coercive one—payment of a reasonable sum as compensation for lost wages that nonetheless permits the transaction to take place. Thus, the decision of this Court in *Seatrain* would seem to support the Board's position in the present case, not Carrier's.

In sum, the Board reasonably found that "under all the surrounding circumstances" (*National Woodwork, supra*, 386 U.S. at 644), the Union did not violate Section 8(b)(4)(ii)(B) of the Act. [15]

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[14] Moreover, damages equal to lost wages were only part of the remedy available to the arbitrator under the contract. 521 F.2d at 753.

[15] In support of its assertion that the Union had a secondary object, Carrier relies on statements by Union counsel at the unfair labor practice hearing characterizing the Union's dispute with Carrier as a primary one (Br. 35-36). Carrier has oversimplified the situation. Union counsel's expressed position at the hearing was that "two parallel disputes" existed, both of which were primary (R. 439). The existence of a secondary object under Sections 8(b)(4) and 8(e) is dependent upon the presence of a neutral, secondary employer, and the mere assertion that a primary dispute existed with one employer does not in itself support the conclusion that another employer is properly characterized as secondary.

C. The Union did not violate Section 8(b)(4)(i) or (ii)(B) of the Act by a resolution adopted by its membership not to waive its contractual rights for Carrier moduline units, by its statements to Carrier that it would rely on its contractual remedies, and by the conduct of one member who acted on his own

1. The resolution adopted by the membership

As shown in the Counterstatement, on June 28, 1973, the Union's general membership adopted a resolution proposed by the Union's executive board that "no allowance be made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Board in the New York City area." [16]

The Board concluded that this executive board sponsored resolution was not designed to induce or encourage its members to refuse to perform services. The Board read the resolution as "merely ask[ing] the union members to decide whether their contractual rights should be waived" (R. 38). There was no suggestion in the resolution that the work perservation clause in the contract be enforced by prohibited economic action such as a refusal to install the moduline unit. Accordingly, the Board was correct in declining to find that the submission of this resolution violated Section 8(b)(4)(i)(B) of the Act. *Local 139, Int'l Union of Operating Engineers, AFL-CIO (Fox Valley Construction Material Suppliers Ass'n Inc.)*, 182 NLRB

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[16] Carrier's statement of the resolution (Br. 50) omits the key point that "no allowance" referred to in the resolution was "no allowance in the c.b.a. [collective bargaining agreement]".

72 (1970). Cf. *N.L.R.B. v. Local Union No. 751, etc.*, 285 F.2d 633, 640 (C.A. 9, 1960). [17]

2. The unauthorized erasure

The Board has held that a union member's refusal to work, even though stemming from the union's position in a dispute with the employer, does not warrant the conclusion that the union has breached the prohibition set forth in Section 8(b)(4)(i)(B) against a union inducing or encouraging employees to engage in work stoppages in the absence of evidence that the union was legally responsible for his conduct. *International Brotherhood of Electrical Workers, Local No. 43, AFL-CIO (Executone of Syracuse, Inc.)*, 172 NLRB 621, 624 (1968). And it is well established that a union is not responsible for the actions of a member solely because of his membership. See *N.L.R.B. v. Cement Masons Local No. 555*, 225 F.2d 168, 173 (C.A. 9, 1955); *Daugherty Company, Inc.*, 147 NLRB 1295 (1964).

The Board found that the evidence was insufficient to establish that the Union impermissibly induced or encouraged the erasure of the moduline units from the Van Etten blueprints by its member Johansmeyer. The resolution approved by the Union's membership almost four months earlier, discussed *supra* pp. 6-7, merely provided that the Union would not waive its rights under its collective agreement; it did not call for job actions to enforce the

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[17] In *Local 139 Operating Engineers, supra*, 182 NLRB 72, a union agent's inquiry of neutral employees as to whether they would leave the job if requested by the union was not considered to be inducement of encouragement within the meaning of Section 8(b)(4)(i)(B). In the instant case, as the Board noted (R. 39) the resolution is even less interpretable as a "request" or "suggestion" (182 NLRB at 74) that union members refuse to perform services as there is no suggestion in the resolution that the contract be enforced by prescribed economic action.

agreement. Moreover, there is no probative evidence that Local 28's president Pasquinucci or any other agent of Local 28 communicated any instructions to Johansmeyer. [18] Pasquinucci's statement to Carrier New York representative Contardi concerning this incident was sufficiently ambiguous that the Board declined to characterize it as an admission that the Union encouraged its members to refuse to work. In the Board's view, the response "That's so" to the question "I hear you have refused to let them sketch the job," could well have referred to the Union's consistently maintained reliance on its contractual rights and remedies. Hence, the Board properly refused to find that the Union was responsible for its member's conduct in erasing the moduline units from the Van Etten blueprints. [19]

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[18] A similar case in this regard is *Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)* 154 NLRB 314, 317-318 (1965), remanded on other grounds, 366 F.2d 823 (C.A. 8, 1966). In that case a union agent told two members that a work preservation clause called for certain work to be done "in the filed," and therefore prefabricated products were not to be installed. Subsequently those members made threatening statements to the manufacturer of the prefabricated products. The Board found no Section 8(b)(4)(i)(B) inducement as the members had not been instructed to make the threatening statements.

[19] The two cases cited by Carrier (Br. 52) to support a violation are well off the mark. *Los Angeles Bldg. & Constr. Trades Council,* 215 NLRB No. 59, at pp. 9-10 (1974) involved statements by a union agent to employees of a neutral employer that the picketing was "authorized and sanctioned." The Board found these statements conveyed the suggestion that these employees should not cross the picket line and that this was an impermissible "inducement" and "encouragement" of the neutral's employees in violation of Section 8(b)(4)(i)(B). *Local 370, United Ass'n of Plumbers (Baugham Plumbing and Heating Co., Inc.)* 157 NLRB 20, 21 (1966) is equally inapposite. There, a union agent reminded its members working for a neutral employer picketed by another union of the obligation of union members to honor all picket lines. The Board found that this was unlawful inducement of an employee of secondary employers to cease working.

3. The Union's statements of position to Carrier

As shown *supra*, the Board found that the Union's invocation of its contractual remedies in response to the utilization of Carrier moduline units by New York signatory contractors was not coercion under Section 8(b)(4)(ii)(B). It is therefore evident that if the Union's prior statements to Carrier of its intentions were "no more than reiteration of its position that it would not relinquish its rights under the collective bargaining agreement," (R. 39) then this too would not amount to threats, coercion or restraint under Section 8(b)(4)(ii)(B). The Board so found.

The record evidence *supra*, pp. 8, 10, shows that on November 13, 1973, Union President Pasquinucci met with Carrier representatives to attempt to resolve the dispute at the Van Etten job. Pasquinucci stated that in view of the vote taken by the membership of his local, he could not negotiate a waiver under the work preservation clause and thus "he could not permit the unit to come in [to New York]."[20] On July 19, 1974, newly elected Union President Stack similarly informed Carrier representative Contardi that the union would not alter its reliance on the existing contract, and that the Union would "insist that [Carrier] go along with the agreement as written."

The Board reasonably construed the thrust of these statements as merely asserting that the Union would invoke its contractual remedies should the Carrier moduline units be used by New York contractors under agreement with the Union. The Board observed that "there was no suggestion that the Union would attempt to enforce its agreement by means other than those

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[20] It was implicit from the context that the Union merely meant that it would not permit the unit to come into New York without asserting its rights under the work preservation clause to deal with the situation.

provided in the agreement." (R. 39). The Board therefore rejected Carrier's interpretation that the Union was issuing a declaration of intention to pressure the contractors not to utilize the moduline units. In sum, the Board's refusal to find these remarks in violation of Section 8(b)(4)(ii)(B) was clearly proper. [21]

D. The Union's assertions that it would resort to its contractual remedies for breach of the valid work preservation provision in its collective agreement and its actual invocation of its contractual grievance procedure to obtain compensation for such a breach are not in violation of Section 8(e) of the Act

The Board concluded that the Union's statements of intention to enforce a work preservation clause lawful on its face and its subsequent contractually sanctioned attempt to seek compensation for the breach of this clause did not violate Section 8(e) of the Act. The Board's conclusion comports with the nature and purpose of Section 8(e) of the Act.

As shown *supra*, pp. 14-15, the inquiry in a Section 8(e) case is whether the employer and union by the terms of their agreement violated

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[21] Carrier cites the Board decision in *United Brotherhood of Carpenters, Local 112 (Summit Valley Industries, Inc.)*, 217 NLRB No. 129 (1975), 89 LRRM 1799, petition for review and cross application for enforcement pending in Case No. 75-2064 (C.A. 9), in support of its position that there was no primary dispute between Local 28 and Carrier (Br. 53). The Board did not reach this issue of Carrier's status as a primary or secondary employer because it found that here there was no coercion directed at Carrier.

In contrast, *Summit Valley* involved threats of picketing, picketing, and union-induced refusals to work by union members designed to coerce manufacturers of modular houses. The Board therefore reached the primary-secondary issue, and adopted the conclusion of the Administrative Law Judge (JD at 28-29) that the union's coercive conduct directed against manufacturers of prefabricated modular homes with whom it had no bargaining relationship was secondary and unlawful.

the Act, whereas the question under Section 8(b)(4) is whether the conduct of the union alone had an unlawful objective. Where the wording and intent of the two parties was to preserve the work for the employees of the employer making the agreement, an agreement is entirely outside the proscription of Section 8(e). It is only where the agreement was tactically calculated to satisfy union objectives elsewhere that it has a secondary purpose and violates Section 8(e) of the Act. *National Woodwork v. N.L.R.B., supra,* 386 U.S. at 643-644. Moreover, this Court has recognized that the question of whether a no-subcontracting clause violates Section 8(e) falls within the province of the arbitrator. *United Optical Workers Local 408 v. Sterling Optical Co., Inc., supra,* 500 F.2d at 222. This is particularly appropriate here, where the issue before the arbitrator under the contract — whether the fabrication of Carrier plenums is work "historically traditionally and customarily" performed by Union members — is also the issue which resolves the unfair labor practice charge based on Section 8(e) of the Act.

As the Board observed (R. 40, n. 10), the instant work preservation clause was clearly not prohibited by Section 8(e). It was a clause which on its face sought to protect the particular employees directly affected by a potential loss of bargaining unit work.[22] Any breach of this work preservation clause was governed by the grievance arbitration procedure, which provided

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[22] Work preservation agreements such as this one *supra* pp. 3-4, covering multi-employer units have long been considered permissible. *Int'l. Union, U.M.W., etc. (Dixie Mining Co. and Dan S. Davison),* 165 NLRB 467 (1967); *United Association Pipefitters Local Union No. 539 (American Boiler Mfg., Assn.),* 167 NLRB 606, 606-607 (1967). The clause's careful specification of the type of jobs coming under its coverage also supports the view that the clause is a lawful work preservation clause. See, *N.L.R.B. v. Local 28, Sheetmetal Workers' International Association,* 380 F.2d 827, 830 (C.A. 2, 1967).

that unit employees would receive payment to compensate them for loss of work stemming from the employer's breach. Enforcement of this clause through the grievance procedure would ordinarily serve the primary objective of allowing unit employees to maintain their level of income in the event some of their work was eliminated through this employer's use of prefabricated goods or otherwise. See, *Enterprise Ass'n. of Steam, etc., Local 638 v. N.L.R.B., supra,* 521 F.2d at 899-900. Carrier has never claimed that the original entering into of the work preservation clause violated Section 8(e). Nor could it do so, inasmuch as the clause is immunized from challenge by the statute of limitations provided in Section 10(b) of the Act. See, *Bryan Mfg. Co. v. N.L.R.B.*, 362 U.S. 411 (1960).[23]

Carrier's focus on the Union's interpretation and application of the applicable portions of the collective agreement misconceives the nature of a Section 8(e) violation. Even assuming *arguendo* that the Union within the Section 10(b) period sought to apply its valid work preservation clause to achieve a secondary objective, this action, if unilateral, would not convert this lawful clause into an unlawful agreement pro-

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[23] Contrary to the argument of *Amicus Curiae* (Br. 34-38), the National Productivity and Quality of Working Life Act of 1975, 15 U.S.C. Sec. 2401, 89 Stat. 733, enacted November 28, 1975, has nothing to do with the issues presented by the instant case. This piece of legislation merely creates the National Center for Productivity and Quality of Working Life within the executive branch of the federal government. Moreover, the Amicus' argument that that the Board's decision here is inconsistent with the National Productivity Act is undercut by the statement of purpose therein (Title 1, Sec. 14) that "there is a national need to increase employment security through such activities as . . . internal work force adjustments to avoid worker displacement, and all other public and private programs which seek to minimize the human costs of productivity improvement." Most significantly, there is the well established presumption against the repeal by implication of policies developed under one statute by policies enunciated in later, unrelated pieces of legislation. See, Sutherland, Statutory Construction, Sec. 23.10 (4th Ed. C.D. Sands 1972).

scribed by Section 8(e). *N.L.R.B. v. Local 28, Sheetmetal Workers,* 380 F.2d 827, 830 (C.A. 2, 1967); *Meat and Highway Drivers Local 710 v. N.L.R.B.,* 335 F.2d 709, 716 (C.A.D.C., 1964); *Local 1322, International Longshoremen's Association AFL-CIO, (Philadelphia Marine Trade Association),* 151 NLRB 1446, 1451 (1965); *United Assn. Pipefitters Local Union No. 539 (American Boiler) supra,* 167 NLRB at 607. This principle stems from Section 8(e)'s prohibition against certain contract terms and the policy against having an unfair labor practice under which both the employer and the Union could be liable being dependent on the objectives of the Union alone.

Thus, contrary to Carrier's contention (Br. 32-33), a secondary application by a union of a work preservation clause that is seemingly valid on its face does not violate Section 8(e) unless it is shown that the original agreement was intended to apply to that situation. This Court said as much when it indicated that "a resort to the clause by the union in a situation to which the clause was irrelevant would be equally innocuous, and, like a mere declaration of intent to enforce would not effect a legally significant 'reaffirmation'." *N.L.R.B. v. Local 28, Sheetmetal Workers, supra,* 380 F.2d at 830. In a similar vein, the District of Columbia Circuit has indicated that:

> To conclude [even] that a contract term falling within the letter of § 8(e) properly falls within its prohibition, there must be either a finding that both parties understood and acquiesced in a secondary object for the term, or a finding that secondary consequences within § 8(e)'s intendment would probably flow from the clause . . . .

Meat and Highway Drivers, Local 710 v. N.L.R.B., supra, 335 F.2d

at 716.[24] Moreover, in determining whether the clause as written was valid, the Board has "never considered extrinsic evidence as to the manner in which the clause has been subsequently enforced where as here the clause is clearly lawful on its face." *United Brotherhood of Carpenters, etc., Local 112 (Summit Valley Industries, Inc.)*, 217 NLRB No. 129 (1975), 89 LRRM 1799 (petition for review and cross-application pending in Case No. 75-2064 (C.A. 9)). See also, *General Teamsters Local 982*, 181 NLRB 515, 517 (1970) enforced sub nom. *Joint Council of Teamsters No. 42 v. N.L.R.B.*, 450 F.2d 1322 (C.A.D.C., 1971).[25]

An examination of the evidence during the relevant period, when measured against the foregoing principles, results in a conclusion that the Board's dismissal of the Section 8(e) allegations should be upheld. The Union statements of intention cited by Carrier as manifesting an impermissibly overbroad interpretation of the valid work preservation clause include the same incidents which the Board, as shown, found not to violate Section 8(b)(4)(B) of the Act. All these incidents involved the Union's acting unilaterally, whereas it takes a bilateral agreement to establish a violation of Section 8(e).

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[24] In this regard it should be noted that Carrier has made no showing that it was the parties' original understanding that the work preservation clause covered prefabricated plenums of the sort involved here, even if this question were open under Section 10(b).

[25] A different situation is presented by a union's unilateral implementation within the Section 10(b) period of an agreement which on its face violates Section 8(e). Both the Board and this Cout have indicated that a union's resort to arbitration to enforce an unlawful hot cargo clause suffices to establish an unlawful reaffirmation of that clause within the meaning of Section 8(e). *Danielson v. International Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Line, supra,* 521 F.2d at 754; *Local 1149 United Brotherhood of Carpenters and Joiners of America, AFL-CIO (American President Lines, LTD.)*, 221 NLRB No. 82 (1975), 90 LRRM 1693.

Thus, the Union's resolution that no allowances be made in its collective agreement for Carrier moduline units, its statements to Carrier several months later with references to the Van Etten job that the Union would rely on its contractual remedies to deal with the use of Carrier moduline units in New York, and the Union's statement to Carrier in July 1974 after the Union election that it would insist on Carrier go along with the agreement as written are obviously all actions wherein the Union dealt with the manufacturer on its own without the participation of the signatory contractors. Moreover, the erasure of Carrier units from the Van Etten blue prints by a Union member acting on his own is irrelevant to an inquiry under Section 8(e) as neither the Union nor Three Boro, the signatory subcontractor, had anything to do with this incident. Finally, notwithstanding the Union's statements of intention to enforce the work preservation clause and Three Boro's own misgivings about the use of Carrier units, the Union never instituted grievance proceedings when Carrier units with prefabricated plenums were used on the Van Etten job. Instead, the Union agreed to waive the contractual wage compensation rights in return for Carrier's agreement to ask the Board not to proceed on the unfair labor practice charges arising out of the Van Etten job. As a result of this waiver the Carrier moduline units were installed by Union members on the Van Etten job in accordance with Three Boro's subcontract without incident. Thus, it cannot be fairly concluded that the Union and Three Boro had agreed to implement their agreement so as to bar the utilization Carrier units with prefabricated plenums.

Furthermore, the Union's invocation in November 1974 of the contractual grievance procedure to obtain damages for General's breach of the work preservation agreement at the Babies Hospital job was not in violation

of Section 8(e). The Union took the position during the grievance proceeding that the work preservation clause's restriction against subcontracting "troffers (plenums)" encompassed the Carrier moduline units with the prefabricated plenums. As shown *supra*, it is clear that the Union's attempt to force General to accede to the Union's overly broad interpretation of a work preservation clause that is valid on its face at most amounts to "an attempt to force the employer to enter into a new and different version of such a clause" *Local 1332, International Longshoremen's Association, AFL-CIO (Philadelphia Marine Trade Association)*, 151 NLRB 1446, 1451 (1965).[26]

Contrary to Carrier's contention (Br. 34), it cannot fairly be said that the Union's action and General's response created a mutually agreed upon unlawful modification of a work preservation clause unlawful on its face. The record evidence shows that General had not acquiesced in Local 28's interpretation of the work preservation clause. As shown in the Counterstatement, Carrier itself short-circuited the grievance procedure by voluntarily reimbursing General for the damages sought by Local 28 before the Joint Adjustment Board had ruled. This resulted in a settlement of the grievance before the Joint Adjustment Board interpreted whether the prefabricated plenums in question came within the scope of the work preservation clause. Such a disposition of the grievance cetainly does not amount to acquiescence by General to Local 28's allegedly illegal interpretation of the meaning of the work preservation agreement. This is true both expressly and by implication in the sense that General had contractually agreed that the joint

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[26] Section 8(b)(4)(A) of the Act prohibits a union from coercing an employer "to enter into any agreement which is prohibited by Section 8(e)." No Section 8(b)(4)(A) violation was alleged in this case.

adjustment board's determination would be binding. Instead, Carrier's payment turned General's role into that of a conduit and eliminated the need for General to agree or disagree with Local 28's application of the contract. There is therefore no basis for concluding that the parties had agreed upon a new clause with a work acquisition purpose that contravened Section 8(e) of the Act.

Hence, the Board properly concluded that even assuming, as Carrier asserts, that the Union's action was designed to achieve an unlawful secondary objective, [27] the Union's unilateral efforts to apply the work preservation clause so as to obtain money damages did not violate Section 8(e) of the Act.

CONCLUSION

For the reasons stated above, it is respectfully requested that the petition for review be denied.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
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National Labor Relations Board.

June 1976

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Washington, D.C. 20570

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[27] Of course, should the Court find that resolution of the Section 8(e) or Section 8(b)(4) charges involves findings as to issues which the Board found unnecessary to reach, such as whether the Union's conduct had a secondary objective, the proper course is a remand to the Board in order to permit such findings and the "drawing of lines more nice than obvious." *Local 761, IBEW, supra,* 366 U.S. at 672.

SUPPLEMENTAL APPENDIX

GENERAL COUNSEL'S EXHIBIT 2, APPENDIX Z

H. COHAN CONTRACTING CORPORATION
Mechanical Contractors
46-41 Vernon Boulevard, Long Island City, N.Y. 11101
(212) 786-7380

General Sheet Metal, Inc.
434 E. 165th Street
Bronx, New York 10456

Att: Morris Lipka

RE: Babies Hospital Addition
9th thru 12th Floor

Job No.

P.O. DATE: 5/16/74 | TAG ORDER: | SUBMISSIONS FOR APPROVAL MUST BE DELIVERED WITHIN 5 DAYS FROM DATE HEREOF

NOTIFY H. COHAN CONTRACTING CORPORATION 48 HOURS BEFORE DELIVERY TEL. (212) 786-7380

CONFIRMATION

Furnish material and compatible labor for the sheet metal work required for the H.V.A.C. Work in accordance with the plans and specifications and Addendums 1 and 2 all as prepared by Meyer Strong & Jones, Engineers and in accordance with the contract between H. Cohan Contracting Corp. and Presbyterian Hospital; including Addendum No. 5.

The following is to be furnished and installed by General Sheet Metal:
All sheet metal ductwork, fittings, etc., acoustically lined ducts, air valves, screens, volume backdraft and fire dampers, motorized combination smoke and fire dampers, plenums, mixing boxes, sound traps, pans and moisture eliminators, registers, grilles, diffusers, flexible connections, safing and baffling for fin tube radiation, casings, gooseneck, belt guards, sheet metal supports, stands and/or platforms (other than structural steel supports), access doors, instrument test holes as required, duct removals to floor only.

Receive, handle, assemble, distribute and set the following items furnished by H. Cohan Contracting Corp.
All filters, filter gauges, filter frames, automatic dampers, all coils, fans of all types with related vibration isolation, lubrication of fans, pullies and belt installation and adjustments, duct thermometers as indicated on drawings and as required by temperature control contractor, rigging stand-by time as required. Carrier Moduline units to be fabricated in accordance with Local Jurisdictional requirements. Moduline Units to be supplied by H. Cohan Corp. This contract shall also include the required time for as-built drawings, 50% handling of A.C. units and rails.

TOTAL NET PRICE: (Including all taxes)---------- $[redacted]

Kindly submit certificates of insurance as per the attached.

ALTERNATE - Anemostat in lieu of Moduline - ADD: $27,000.00

(Continued)

#34
Ap. Z

SHIP TO:

H. COHAN CONTRACTING CORP.

PURCHASE ORDER No. 4087

THIS PURCHASE ORDER NUMBER AND JOB NUMBER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY, Petitioner,	)	
v.	)	No. 76-4046
NATIONAL LABOR RELATIONS BOARD, Respondent,	)	
and	)	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, Intervenor.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Kenneth C. McGuiness
1747 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Sol Bogen, Esq.
1 Pennsylvania Plaza
New York, New York

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 25th day of June, 1976.